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# In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1953

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No. [redacted]57

JULIUS EMSPAK, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Court of Appeals (R. 353-364) is reported at 203 F. 2d 54. The opinions of the District Court denying petitioner's motions to dismiss the indictment are reported at 95 F. Supp. 1010, 1012.

### JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1952 (R. 365). A petition for rehearing was denied on April 13, 1953 (R.

375). The petition for certiorari was filed on May 13, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1264(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence supports the finding, implicit in petitioner's conviction without a jury, that he did not base his refusal to answer certain questions put to him by a subcommittee of the House Committee on Un-American Activities on a claim of privilege against self-incrimination.

2. Whether the evidence supports a similarly implicit finding that petitioner was apprised of the fact that the grounds asserted by him as a basis for refusal to answer had been rejected by the Committee and that he was expected to answer the questions.

3. Whether a sufficient showing was made to entitle petitioner to a dismissal of the indictment, or to a hearing to investigate the qualifications of the grand jurors, when it was shown that ten of the twenty members of the grand jury were government employees and that two more were wives of government employees, and various data were offered purporting to show that government employees at the time of the indictment could not be impartial with respect to a person alleged to be a Communist.

4. Whether under the First Amendment, a Congressional Committee, duly authorized to investigate security measures designed to prevent Communist union officials from gaining access to plants

doing secret defense work, may question an official of a trade union with a substantial membership in such plants as to whether he is a member of the Communist Party or certain other organizations thought to be Communist-front groups, and whether he knows certain other trade union officials.

## STATUTE AND RULE INVOLVED

2 U.S.C. 192, R. S. 102, as amended, provides as follows:

> Refusal of witness to testify.
>
> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Federal Rules of Criminal Procedure:

> Rule 6. The Grand Jury.
>
> * * * * *
>
> (b) Objections to Grand Jury and to Grand Jurors.
>
> * * * * *

(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

## STATEMENT

On November 20, 1950, petitioner Emspak was indicted by a grand jury in the United States District Court for the District of Columbia for having wilfully refused to answer 68 questions before a duly created subcommittee of the Committee on Un-American Activities of the House of Representatives, in violation of the provisions of 2 U.S.C. 192 (R. 4-13).

He pleaded not guilty (R. 13-14), and moved to dismiss the indictment (R. 14-17). One of the issues raised by this motion was a contention that the indictment was invalid because fewer than 12 members of the grand jury which returned it were impartial (R. 16), for the reason that 10 of its members were government employees and two more were wives of government employees. In the alternative, a hearing was sought so that this bias could be shown (R. 25-27). The motion was supported by affidavits by petitioner's counsel to the

effect that, by virtue of the atmosphere revealed and exemplified by such matters as Executive Order 9835, known as the President's Loyalty Order, and the enactment of the Internal Security Act of 1950, the climate of opinion in Washington was such that government employees would have hesitated to vote against the return of an indictment in this case (R. 25-27, 85-86). This affidavit was in turn supported by 9 newspaper clippings, some with unsigned articles, and others reflecting the unsworn and untested views of certain columnists, some of whom expressed the view that the loyalty program was having bad effects on government workers (R. 97-114). On the Government's motion, these affidavits were stricken, and the motion for a hearing was denied (R. 116-119; 95 F. Supp. 1010), on the ground that the affidavits constituted insufficient basis for inferring bias under the tests laid down by this Court in *Dennis* v. *United States*, 339 U.S. 162.

On the trial of the case, the following was stipulated or shown:

The Committee on Un-American Activities was authorized, both by statute and House Resolution to make, from time to time—

> * * * as a whole or by subcommittee * * * investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks

> the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

60 Stat. 828; H. Res. 5, 79th Cong., 1st sess. Acting pursuant to this authorization, and for the purpose of reporting on a bill (the so-called Wood Bill) which had been referred to it by the House, the Committee was, during December 1949, as the committee counsel testified (R. 157), investigating into "the infiltration of Communist labor unions working on defense projects, from the standpoint of individuals who weren't actually working in the plant but who were officials of the union, as distinguished from those who had actual contact with classified material." The hearing to which the petitioner was called, the counsel also testified, "was set up for the particular purpose of developing the practices and duties of various officials of the national organization of U E [1] with the idea of determining whether or not there was a difference in practice, in certain Government agencies, in screening or clearing officials of the union for security purposes in plants where the Atomic Energy Commission, or the Army, Navy, and Air Force, were having secret Government projects worked upon" (R. 157).

Pursuant to the Committee's subpoena, petitioner, who was general secretary and an ex-officio member of the Executive Committee of UE, ap-

[1] United Electrical, Radio, and Machine Workers of America.

peared before a subcommittee of the Committee on December 5, 1949 (R. 239, 159) at which time he was asked a number of questions, for the most part relating to the structure and activities of the United Electrical, Radio, and Machine Workers of America and to his activities as editor of the U E News (see R. 159-199, 37).

These questions petitioner answered. But to sixty-eight of the questions asked him by the subcommittee, he made responses which the Committee did not regard as answers. Fifty-eight of these questions asked in substance that he state whether or not he knew certain named individuals and could disclose whether or not those individuals presently held or had held certain positions in the UE (R. 5-12).[2] Eight of the questions related to petitioner's possible membership in the Communist Party, present or past, and to various evidences of that membership (R. 12-13); and the other two asked about his "affiliation" with the National Federation for Constitutional Liberties and his "association" with the Civil Rights Congress (R. 12).[3]

Petitioner's refusal to answer these questions,

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[2] Petitioner showed by affidavit, in opposition to his indictment, that 17 out of the 50 persons about whom he was questioned, and refused to answer, had been charged before a Congressional committee as having Communist and Communist-front affiliations (R. 67-85); and that the UE itself was thought to be Communist dominated (R. 51-56).

[3] As to these questions, petitioner showed by various documents introduced in opposition to the indictment that he had been charged with being a Communist (R. 29-36, 47-49, 50). He also stated that the two named organizations had been said to be communist front groups (R. 32).

which he now contends was based on a claim of privilege against self-incrimination, but which he then claimed was not a refusal at all (see below), may be illustrated by the questions and answers to some of the earlier questions, since the later answers were in general a reference to the earlier ones. The relevant colloquy follows (R. 167-173):

* * * * *

Mr. TAVENNER [Committee Counsel]: Mr. Emspak, are you acquainted with Joseph Persily?

Mr. EMSPAK: Mr. Chairman, I would like to say something at this point.

Mr. MOULDER: You mean in response to the question?

Mr. EMSPAK: I will answer the question; yes, in response to the question and as a statement of position.

* * * * *

As an individual I would like to say one thing, and that is this: The line of questioning that counsel is developing now is a line that has been used on numerous occasions by this committee and other congressional committees in an attempt to harass the union, its leadership, and its members. It is a line of questioning that goes against my grain as an American. I was born in this country. Everything I am——

* * * * *

* * * I owe to the rich heritage and tradition of this country. I do not believe that a committee of this kind, especially in view of

the recent record of this committee where it stooped to interfere in the partisan affairs of a local union, or any congressional committee, because of the rich tradition of this country which, if not perverted, will lead to a greater and better country—I don't think a committee like this or any subcommittee has a right to go into any question of my beliefs, my associations, or anything else. I have a couple of kids. They have a stake in this country, too.

Mr. MOULDER: I want to give you full opportunity to express yourself in answer to the question, but you are making an oration now.

Mr. EMSPAK: It is not an oration. It happens to be a very profound personal feeling.

Mr. MOULDER: What is the question?

Mr. TAVENNER: The question is: Are you acquainted with Joseph Persily.

Mr. MOULDER: How do you spell that?

Mr. TAVENNER: P-e-r-s-i-l-y.

Mr. EMSPAK: Because I have a stake in this country——

Mr. MOULDER: You are not answering the question. He asked you if you are acquainted with this man.

Mr. EMSPAK: I will answer it.

Mr. MOULDER: Are you or not?

Mr. EMSPAK: I was on the verge of answering it.

Mr. MOULDER: If you have any explanation to make you will be permitted to do so after you answer the question.

Mr. EMSPAK: Because of my interest in what is going on these days, because of the activities of this committee——

Mr. MOULDER: Are you going to answer the question?

Mr. EMSPAK: Because of the hysteria, I think it is my duty to endeavor to protect the rights guaranteed under the Constitution, primarily the first amendment, supplemented by the fifth. This committee will corrupt those rights.

Mr. MOULDER: Do you think it corrupts you to answer the question?

Mr. EMSPAK: I certainly do.

Mr. MOULDER: Why does it corrupt you?

Mr. EMSPAK: Your activities are designed to harm the working people of this country. Every action this committee has ever taken has done that. You interfered last summer in the election of a local union at the request of a priest. You know that. You dragged down the prestige of this country.

Mr. MOULDER: You are not going to take over this committee.

Mr. EMSPAK: I don't want to.

Mr. MOULDER: And your statements are preposterous. The purpose of this committee is to expose communism as it exists in this country. What is the question?

Mr. TAVENNER: Are you acquainted with Joseph Persily?

Mr. EMSPAK: For the reasons I stated before, I answered it.

Mr. MOULDER: Then you refuse to answer the question?

Mr. EMSPAK: No. I answered it.

Mr. TAVENNER: Are you or are you not acquainted with Joseph Persily?

Mr. EMSPAK: I answered the question.

Mr. TAVENNER: Your replies are a refusal to comply with the request to answer it?

(Witness confers with his counsel.)

Mr. MOULDER: The record will reveal that you have not answered the question.

Mr. EMSPAK: I have answered it to the best of my ability under the circumstances.

Mr. MOULDER: Any further questions?

Mr. TAVENNER: Yes. In what capacity is Joseph Persily associated with the UE at this time?

Mr. EMSPAK: It is the same question over again. I will give the same answer.

Mr. TAVENNER: Is he an organizer in the UE?

Mr. EMSPAK: Mr. Chairman, it is the same question.

Mr. TAVENNER: You refuse to answer that?

Mr. EMSPAK: I answered it.

Mr. TAVENNER: Are you acquainted with Albert Smith?

Mr. EMSPAK: The same answer applies to that.

Mr. TAVENNER: In other words, you are refusing to answer whether you are acquainted with him or not?

Mr. EMSPAK: I have answered the question as I see the answer.

Mr. TAVENNER: Is he employed by UE?

Mr. EMSPAK: Mr. Chairman, I answered the question.

Mr. MOULDER: Could you tell us who those people are, Mr. Counsel?

Mr. EMSPAK: Excuse me, please.

(Witness confers with his counsel.)

Mr. TAVENNER: Joseph Persily and Albert Smith are the two persons whose names were mentioned.

Mr. MOULDER: Who is Joseph Persily?

Mr. TAVENNER: I thought he was connected with the UE, but I am unable to understand from this witness what the connection is, if any.

Mr. MOULDER: Do our records reveal who he is?

Mr. TAVENNER: I do not know whether they do or not, Mr. Chairman.

Mr. Emspak, has Max Melford ever been connected with UE as a field organizer?

Mr. EMSPAK: Mr. Chairman, on these questions, which are all essentially the same, of course, when this hearing was announced according to the press reports, at least, it was announced because this committee presumably was interested in finding out things with reference to individuals in our organization by using whatever means it has at its disposal, and for the purpose of trying to perhaps frame people for possible criminal prosecution.

I don't see how or why any individual should be subjected to that kind of questioning here if he is going to maintain, you know, his feelings on these questions, and I tried to express the feeling before when you interrupted me. I just don't intend, as I said then, to be a party to any kangaroo court proceedings of this committee or any other congressional committee.

I think I have the right to reserve whatever rights I have in that respect to whatever appropriate bodies may be set up to deal with questions that come up.

Mr. MOULDER: Do you mean to say you have people in your organization who have information that would subject you to criminal prosecution?

Mr. EMSPAK: No; I don't, Mr. Chairman. As a basic proposition—and it has worked over the years and over the last few months as far as this committee is concerned—a slick job——

Mr. MOULDER: Do you know them or not?

Mr. EMSPAK: That does not concern this committee at all.

Mr. MOULDER: Is it your feeling that to reveal your knowledge of them would subject you to criminal prosecution?

Mr. EMSPAK: No. I don't think this committee has a right to pry into my associations. That is my own position.

Mr. TAVENNER: Is Max Helford at the present time a field organizer for the UE?

Mr. EMSPAK: Mr. Chairman, that is a repetition of basically the same question, and the same answer stands.

Mr. TAVENNER: Was Phil Saba originally from local 155?

Mr. EMSPAK: I answered that question.

Mr. TAVENNER: And is he now a field organizer for the UE in district 1?

Mr. EMSPAK: I answered that question and that is the only answer I will give on any of my associations, for the reasons stated.

Mr. TAVENNER: Is Hank Rhine presently an international representative of the UE?

Mr. EMSPAK: Same answer.

Mr. TAVENNER: Is Jack Gorelick now affiliated with the UE?

Mr. EMSPAK: Same answer.

Mr. TAVENNER: Is Ernest Moyer a field organizer for UE in the Easton area?

Mr. EMSPAK: Same answer.

Mr. TAVENNER: Do you know James Lustig?

Mr. EMSPAK: Same answer.

Mr. TAVENNER: Is he an international representative of UE?

Mr. EMSPAK: We can go on endlessly like this, I suppose, but the same answer holds.

* * * * *

A report of the Committee was thereafter, on August 10, 1950, submitted to the House, reciting that petitioner had been called before the Committee and had refused to answer questions "pertinent to the subject under inquiry" (R. 275), which were set out verbatim, and concluding that he was therefore in contempt of the House of Representatives (R. 255-275, 240). The report was thereupon, by House Resolution of the same day, certified to the United States Attorney for the District of Columbia for appropriate action (R. 240).

At the conclusion of the trial, the judge, sitting without a jury, found petitioner guilty. He was sentenced to imprisonment for a period of six months and to pay a fine of $500 (R. 136-137).

On appeal, the judgment was affirmed by the

Court of Appeals sitting *en banc*. With respect to the issues presented by the petition for certiorari, the court was divided as follows: (1) All the members of the court, except Judges Bazelon and Edgerton, agreed (a) that it had not been shown that the grand jury was invalid, and (b) that insufficient data had been presented to require a hearing on the issue (R. 354-355).[4] Judges Bazelon and Edgerton thought that a hearing was called for on that issue (R. 364). (2) All of the court, except Judges Fahy, Bazelon and Edgerton, agreed that the Committee had made it sufficiently clear to the petitioner that he was required to answer the questions in indictment, and that no specific direction to answer, *in haec verba*, was required (R. 356-357, 362-363). The dissenting judges thought that, under the ruling in the companion *Quinn* case, a new trial was required to determine whether petitioner had been clearly advised that his objections to answering had been rejected and that he had been given another opportunity to answer (R. 363-364). Although agreeing that there was evidence to support a finding that petitioner had been so apprised, they thought that it was not clear that the trial judge had applied proper standards. (3) The

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[4] Judges Prettyman, Washington and Stephens, however, reached this conclusion because they thought that the record put it beyond doubt that "(1) * * * the charge before the grand jury was that [petitioner] refused to answer certain questions and (2) * * * that [petitioner] said that he had refused to answer those questions." There was thus "no indication that Government employees would not be suitable grand jurors in respect of the charge which was before them in this particular case" (R. 361).

same majority of the court, apparently, was also of the view that Emspak had not in fact claimed the privilege against self-incrimination, but had made his objections more broadly to the general activities of the Committee (R. 357-358). The dissenting judges did not pass on this question. (4) The opinions below did not discuss petitioner's contention here based on the First Amendment.

ARGUMENT

1. Petitioner's motion for a judgment of acquittal was based, *inter alia*, on the contention that "the evidence shows that defendant claimed his privilege against testifying under the Fifth Amendment" (R. 133).[5] The verdict of guilty by the trial judge thus represents a finding that petitioner failed to claim the privilege, either in express terms, or in language which could, in its context, have reasonably been so understood. That finding, concurred in by the court of appeals is, we submit, amply supported by the evidence.

Petitioner did not at any point in his extended remarks indicate by any form of words that he feared that an answer to any particular question would incriminate him. In fact, he specifically disavowed that his answers might tend to incriminate him, in the following language (R. 265):

> Mr. MOULDER: Do you mean to say you have people in your organization who have information that would subject you to criminal prosecution?

[5] The contention was renewed in petitioner's motion for a new trial (R. 134-135).

Mr. EMSPAK: No; I don't, Mr. Chairman. As a basic proposition—and it has worked over the years and over the last few months as far as this committee is concerned—a slick job——

Mr. MOULDER: Do you know them or not?

Mr. EMSPAK: That does not concern this committee at all.

Mr. MOULDER: Is it your feeling that to reveal your knowledge of them would subject you to criminal prosecution?

Mr. EMSPAK: No; I don't think this committee has a right to pry into my associations. That is my own position.[6]

On repeated occasions throughout his testimony he made statements to the effect that the subcommittee had no right to pry into his associations. On those occasions when he did denote his failure to answer a particular question as a refusal, he addressed his objection to the whole inquiry and the authority of the subcommittee rather than to any specific propensities of the particular questions asked. Many of his remarks were, in substance, a castigation of the subcommittee for its past and present methods and motives. In short, although petitioner, an editor and official of standing in the union, who was represented by counsel, made extensive remarks obviously patterned and precon-

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[6] Whether this disclaimer of the privilege against self-incrimination be taken to apply to a single question, or be considered along with all the other statements of petitioner to relate to his failure to answer all sixty-eight questions, the final result is the same. Any one of the counts would suffice to support the judgment. *Sinclair* v. *United States*, 279 U.S. 263, 299.

ceived for the occasion, at no time during his questioning did he use the simple, familiar language which would have conveyed to the subcommittee, and to the court, that he feared that his answer to a particular question would incriminate him. On these facts, the trial court was amply justified in its conclusion that petitioner did not intend to claim the privilege.

Petitioner makes much of the fact that, at one stage of the proceeding while engaged in an extensive upbraiding of the subcommittee not directed at any particular question and in disregard of the fact that he was being asked questions while talking, he said (R. 168):

> Because of my interest in what is going on these days, because of the activities of this committee * * * because of the hysteria, I think it is my duty to endeavor to protect the rights guaranteed under the Constitution, primarily the first amendment, supplemented by the fifth. This committee will corrupt those rights.

The trial court was amply justified in concluding, as it apparently did, that this was not intended as a claim of privilege as to any of the questions asked. Its context indicates that it was part of a speech the petitioner was determined to make regardless of what questions were asked, and that it was directed at the authority of the subcommittee to question him, rather than at the propensities of any particular question. The oblique reference to the Fifth Amendment could as well refer to the right to due process of law as to the privilege. The

privilege against self-incrimination is neither actually nor colloquially understood as a "supplement" to the First Amendment. Petitioner's general reference to the Fifth Amendment clearly did not suffice to put the subcommittee on notice that petitioner intended to assert his claim of privilege against self-incrimination as to all the questions.

Petitioner also asserts (Pet. 22-23) that his statement, when asked whether he knew certain officials, that the committee "presumably was interested in finding out things with reference to individuals in our organization by using whatever means it has at its disposal, and for the purpose of trying to perhaps frame people for possible criminal prosecution" represents a claim of privilege. But it was almost immediately thereafter that he was asked "Is it your feeling that to reveal your knowledge of them would subject you to criminal prosecution?" to which he replied, "No. I don't think this committee has a right to pry into my associations. That is my own position." When later petitioner kept insisting that he was making the same answer, not only as to his association with other individuals, but as to his membership in the Communist Party, the committee would have been justified in assuming that he was not asserting a claim that his testimony would tend to incriminate him.

The claim of privilege must be addressed to a particular question and must assert specific grounds. See *United States* v. *Murdock*, 284 U. S. 141, 148, where this Court refused to consider a belated claim that a question, as to which the privilege had been claimed on the ground that it was

incriminating under state law, was also incriminating under federal law. It is not enough that a general objection be taken to the authority of the committee, or the materiality of a particular question asked. The privilege against self-incrimination must be asserted "upon that specific ground" (*United States* v. *Skinner,* 218 Fed. 870, 876 (S.D. N.Y.)), and the witness "* * * must say so in unmistakable language and give the reasons for shielding himself." *In re Knickerbocker Steamboat Co.,* 139 Fed. 713, 716 (S.D. N.Y.). See also *Vajtauer* v. *Commisioner,* 273 U.S. 103, 113. Petitioner's alleged assertion of the privilege clearly failed to meet the prescribed standard of clarity and specificity.

2. Petitioner concedes that the view of the majority of the court below is that a witness before a Congressional committee who raises an objection to a question must in some manner be clearly apprised that the objection has been rejected and the witness required to answer (Pet. 26-27).[7] He does not seriously press the contention that this must be done by the rigid formula of a specific direction to answer followed by another refusal. Thus the question on this phase of the case is whether the evidence is sufficient to justify the conclusion that petitioner's refusals to answer were in the face of his knowledge that his objections thereto had been rejected.

The affirmative answer to that question is clearly

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[7] That such was the view of the majority of the court clearly appears from its action in the related *Quinn* case in remanding for determination of such issue. 203 F. 2d 20.

established by a mere reading of the record of petitioner's appearance, the pertinent portion of which is set forth in the Statement, *supra*. Some of the questions asked (e.g. "Are you acquainted with Joseph Persily") were repeated over and over, only to be met with refusals to answer which petitioner refused to concede were refusals. There is nothing in this record which would support the view that petitioner's failure to answer stemmed from a belief that the committee had abandoned its unanswered question. Even the dissenting judges below agreed that "the record reveals matters which might be said to reflect an adverse ruling by the Committee on the appellant's objections" (R. 364). The finding, implicit in the verdict by the trial court, that petitioner's refusal was deliberate, was so clearly required by the evidence that the majority of the court below properly found that there was no occasion to remand the cause.

3. Petitioner moved to dismiss the indictment on a summary affidavit of his attorney to the effect that the prevailing atmosphere in Washington at the time the indictment against him was returned was such that the 10 grand jurors who were Government employees, and the two who were wives of Government employees, could not have decided impartially whether or not a person in petitioner's circumstances should be indicted (R. 25-28, 85-96).[8]

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[8] Rule 6(b)(2) of the Federal Rules of Criminal Procedure provides:

> A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the

This was in turn supported by newspaper clippings showing the unsworn views of nine persons, mostly columnists, which appeared principally in 1947,[9] some of which were to the effect that the Government loyalty program was creating doubts and fears among Government employees (R. 97-114). It was, and is, then urged that this showing, under the recent ruling of this Court in *Dennis* v. *United States,* 339 U. S. 162, required either dismissal of the indictment, or a hearing on the issue of bias.

In the *Dennis* case, this Court rejected the contention that the mere fact of the existence of the President's Loyalty Order (Executive Order 9835) was sufficient to establish such bias through fear as would disqualify Government employees from service on a petit jury on a trial of a known Communist indicted for contempt of the House Committee on Un-American activities. Petitioner, whose attack goes to a grand rather than a petit jury, has made no greater showing here.

The data submitted show that the President's Loyalty Order of 1947 required official consideration whether large numbers of present and prospective Government employees had "affiliation" or "sympathetic association with" groups designated by the Attorney General as "totalitarian, fascist, communist, or subversive * * *." As a result of this order, of investigations conducted pursuant to

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ground that one or more members of the grand jury were not legally qualified if it appears * * * that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

[9] Six of the nine articles appeared in 1947; one, in 1948; and two, in 1949.

its standards, and of the serious consequences of malicious and irresponsible accusation, it is said to have become apparent "that the only way that a government employee could possibly hope to safeguard his livelihood and the security of himself and his family was to express a hostility to any person, idea, or activity which could in any way possibly be construed to be of a 'Communist' character" (R. 91-92).

The data further allege that in specific instances judges were censured by individual members of Congress for conduct which was construed by those members of Congress to be too favorable to persons they believed to be Communists (R. 88). In further support of his motion, petitioner attached eight newspaper clippings which apparently reflected the view of some members of the press that the loyalty program was having deleterious effects on the morale of Government workers, encouraging the employment of loyal "dolts" (R. 102-103), and, in some instances, permitting malicious persons to make irresponsible allegations of disloyalty (R. 105-107).[10]

This showing does not suffice to meet the standards for showing bias which were required by the *Dennis* case. The loyalty order on which petitioner here relies was in effect at the time of the *Dennis* trial. It is true that the loyalty program had been

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[10] As we pointed out, *supra*, all of these antedated the grand jury in question here, some by as much as three years. Petitioner did not attempt to assay whether the passage of time, in this era of the investigation, made Washington grand jurors more or less sophisticated with respect to unproved charges.

in force longer at the time of the present petitioner's trial than it had been at the time of the *Dennis* trial, and that therefore the objection that Dennis' complaint required the Court to speculate as to what would happen in pursuance of the order is no longer present. But that rather emphasizes that petitioner cannot show that it has had the consequences which this Court has indicated would alone justify any interference on its part. Thus there is lacking here what the Court emphasized was lacking in *Dennis,* 339 U. S. at 168.

> * * * [There was no] evidence which would indicate that investigatory agencies of the Government had recognized in the past or would take cognizance in the future of a vote of acquittal * * *. Nor was there evidence with respect to the existence of a climate of opinion among Government employees that they would jeopardize their tenure or provoke investigation by such a verdict.

Moreover, we think it is clear that the considerations which apply in determining the question of the bias of petit jurors do not necessarily apply to the same extent to a claim of impartiality of individual grand jurors. It must be remembered that "an indictment is, after all, no more than an accusation." *Swan,* Ch. J., in *United States* v. *Remington,* 191 F. 2d 246, 252 (C.A. 2). The absence from normal grand jury process of *voir dire* examination, the best single guarantee that bias will be detected, indicates the basic differences between the two

kinds of jury. The recent cases in which indictments have been invalidated because of defects in the methods of choosing grand jurors have all involved systematic exclusion from the panel of a class of persons, such as women, Negroes, and wage earners. See, e.g., *Ballard* v. *United States*, 329 U.S. 187; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217. But there is a difference between a decision that a grand jury which is not representative because of the basis of selection is not a proper grand jury and a decision that particular grand jurors, generally qualified, are not qualified to return an indictment in a particular case. The fact that a particular grand jury must pass on a whole gamut of cases, ranging widely over many kinds of accused and many kinds of issues, means that if the arguments advanced here prevail, the courts will become immersed in assessing all sorts of claims that, with respect to a particular defendant, the grand jury through fear or bias did not act freely or impartially. At the very least, we suggest, the courts cannot be drawn into that kind of an inquiry on the basis of the vague and speculative showing here made.

More particularly, as the opinion of Judge Prettyman points out, the vague showing made by petitioner is no justification for the judicial fishing expedition sought, in view of the narrow scope of the offense and the clear evidence of violation. Even as petitioner concedes the facts, there clearly was a proper basis for indictment, i.e., a *prima facie* showing that petitioner had refused to answer per-

tinent questions. The subtler considerations as to a possible claim of privilege or the meaning of refusal to answer are obviously not the kind of questions which a grand jury would be called upon to decide. There is thus no basis for a claim of prejudice on the grounds alleged.

4. Finally, petitioner contends that his conviction violates the First Amendment. It is, however, a little difficult to see how a disclosure by an officer in a union that he knows or does not know certain people, who apparently are also officers in that union, or a disclosure of what their jobs in the union are, can be a disclosure of political belief, allegedly protected from legislative inquiry by the First Amendment. As this conviction can stand if only one count is sound, this is a sufficient answer to the whole point.

In any event, it is clear that possible Communist infiltration into a national union of major importance in a nation-wide industry which has large numbers of defense contracts, and the further possibility that that union's officials are permitted access to plants without normal security checks, is an appropriate area for Congressional concern. And it is equally clear that the House Resolution authorizes the Committee on Un-American Activities to undertake this investigation. Compare *United States* v. *Rumely*, 345 U.S. 41, with instant resolution at pp. 5-6, *supra*. This Court has held that, within the limitations of the First Amendment, Congress may constitutionally require leaders of labor unions, which invoke the benefits of the Fed-

eral Labor Management Relations Act, to disclaim under oath their membership in the Communist Party. *American Communications Association* v. *Douds*, 339 U.S. 382. Clearly, therefore, Congress may constitutionally inquire into the Communist membership of leaders of a particular union who are believed to have access to significant defense information.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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